

STATE OF MAINE

DEPARTMENT OF MARINE RESOURCES

IN THE MATTER OF THE APPLICATION OF)	FINDING OF FACT,
RALPH L. JACOBS, JR. AND TIM KIEF)	CONCLUSIONS OF LAW, AND
FOR AN AQUACULTURE LEASE LOCATED)	DECISION
IN DYER BAY, STEUBEN, WASHINGTON)	
COUNTY, MAINE)	

On August 2, 1999, Ralph L. Jacobs, Jr. of Milbridge and Tim Kief of Hancock, Maine applied for an aquaculture lease totaling 31.2 acres of coastal waters in Dyer Bay, Steuben, Washington County, Maine. The applicants requested the lease for a term of 10 years for the purpose of cultivating blue mussels (Mytilus edulis).

Approval of aquaculture leases is governed by 12 M.R.S.A. §6072. This statute provides that a lease may be granted by the Commissioner of the Department of Marine Resources (DMR) if it is determined that the project will not unreasonably interfere with the ingress and egress of riparian owners, navigation, fishing or other uses of the area; the ability of the site and surrounding areas to support ecologically significant flora and fauna; or the use or enjoyment within 1,000 feet of municipally, state, or federally owned beaches, parks, or docking facilities. The Commissioner must also determine that the applicant has demonstrated that there is an available source of organisms to be cultured for the lease site.

A public hearing on this application was held May 1, 2000, in Steuben.

**Evidence Introduced Concerning the Nature
and Impact of the Proposed Lease**

The co-applicants, Ralph L. Jacobs, Jr. and Tim Kief, presented their application, provided testimony and answered questions. Exhibits 1 and 2.

The applicants are commercial fishermen who have owned and operated draggers for scallops and mussels for many years. Both fishermen have also fished for lobster and worked in other sectors of the commercial fishing industry.

Mr. Jacobs testified that he and Mr. Kief had requested to amend their application to reduce the acreage for 31.2 to 16.2 acres, dropping tracts 1, 2, 3 and 4 from the southern portion of the proposed lease. The reduction was due to the greater abundance of eel grass within the southern area than in the northern half.

The co-applicants testified that they would obtain wild seed mussel using their own vessels or from Great Eastern Mussel (GEM) whose vessel, the St. George, would spread the seed during the spring. Seeding would take approximately 15 days of time comprised of three to four days per week over a 1½ to 2 month period. Harvesting would be by drag that would not begin until November 1 and generally take place approximately three to four days per week, during the months of November and December.

The co-applicants testified that they proposed a condition on the lease, if granted, that all dragging and seeding activity would take place from November 1 through April 14, dates inclusive, each year. In their opinion, this restriction would reduce any conflict of use in the area with lobster fishing gear. The area is generally fished for lobster during the months of April through October, and according to the application the proposed lease does not currently have a commercial quantity of mussels. The co-applicants each testified that they would honor a gentlemen's agreement between the Town of Steuben, on behalf of the lobster fishermen, and the president of GEM, on behalf of mussel draggers who work for him, to mirror the proposed lease date restrictions in the area described as the head of Dyer Bay.

Mr. Jacobs testified that their boats are currently moored in Yeaton Cove, approximately a mile south in Dyer Bay on Dyer Neck, in Steuben. He testified that they have permission to access a private dock facility located there to unload harvested mussels. The facility is owned by Charles Kelly and Greg Norton. The co-applicants have used this facility for the past three years and would continue to use it; however, if necessary the nearest public facility available is in Gouldsboro, located in Gouldsboro Bay due west of Dyer Bay.

A biologist employed by the Department, testified about the statutorily required site review that he conducted November 12, 1999. The Department report included the following

criteria: a scuba diver survey of the local flora and fauna and bottom composition; vertical profiles of the water column which include temperature, salinity, dissolved oxygen and pH, and depths; proximity measurements of the proposed site to shore and to other leases; plus observations and documentation of local fisheries. Exhibit 3.

The biologist testified that, during the dive, an underwater video was taken. The dive took place at high tide and had an approximate depth of 17' with 10' of visibility throughout the dive. The dive began on the southwest portion of the proposed lease and traversed the originally proposed 31.2 acre area to the northeastern portion of the site. He testified that he observed patches of mussels throughout the dive. Eel grass was estimated as covering approximately 60% of the southern half of the site and approximately 15% coverage on the northern portion. The biologist also stated that he observed an occasional rock crab. The biologist explained that he did not observe any drag marks in the soft (mud) sediments; however, in his opinion the proposed lease had likely been dragged in the past. According to the Department's report, the nearest distance to shore would be approximately 496' from the proposed NE corner due north northeast to the nearest shore. In response to a concern that the proposed seeded mussels would negatively impact nearby clam populations in the intertidal zone, he explained that he would consider the proportion of mussels on the proposed lease to the pre-existing sizable mussel resource and implied there would unlikely be an impact from the proposed lease activities.

A selectman, who is a lobster fisherman, testified that in his opinion the aquaculture lease law is unfair; however, he would support the proposed lease if it would prevent dragging during the lobster season and in lobster gear. He expressed concern that there may be an effect on the clam flats and he did not believe the applicants would gain much economically by seeding the proposed lease.

Two other local fishermen provided testimony. Their concerns focused on the attempts by the lobster fishermen from the area to have legislation passed that would close the head ends of the bays to all dragging annually on April 15. The problems described with the

gentlemen's agreement cut off date for dragging were explained to be with the president of GEM, not the co-applicants.

The local Harbormaster provided testimony. He explained that local boats use the northern portion of the proposed lease as a common passage from the southeast to northwest across the northern half of the site. He testified that as long as there would be no build-up of mussels on the bottom, the proposed lease would not cause problems with navigation. According to the Department's report the Harbormaster indicated that the proposed lease would not interfere with a single mooring located north of the proposed lease off Clay Cove. The Harbormaster testified that there have been winters in the past when the area ices over to 1' - 1½' thickness. Regarding fishing, the proposed lease is a popular recreational spot for striped bass fishing during the summer. The Harbormaster testified that due to the high numbers of lobster traps in the area, a gentlemen's agreement was reached three years ago with the president of Great Eastern Mussel (GEM). This agreement was basically described as a communication agreement whereby the president of GEM would contact the persons running the mussel draggers, operating for his company, to leave this area when he had been contacted by a selectman from Steuben and informed that the lobsters had moved back into the area. This generally occurs in April. In the Harbormaster's opinion the agreement had worked during the past two years and indicated that if and when the co-applicants were, or would be, contacted that they would leave the area this year also. The Harbormaster requested that the applicants continue to honor this gentlemen's agreement, if the lease were granted, and stop dragging in the surrounding bay as well as the proposed lease as of April 15, each year. (The co-applicants testified that they would agree to this request.) The Harbormaster also spoke favorably of the co-applicants' good character.

Findings of Fact

The proposed lease is located approximately 496' from the nearest shore due north northeast. This was confirmed by the Department's biologist during a site visit on November 12, 1999. According to the application no use of riparian lands were required or requested. Based

on this evidence, I find that the proposed lease will not unreasonably interfere with the ingress and egress of riparian owners.

According to the local Harbormaster, the proposed lease is located in water depths ranging from 7' to 13' across the northern portion of the site. The Harbormaster described this area as a common navigable channel to access the northern areas of Dyer Bay. The proposed lease activities would be for bottom culture, no structures or gear would be placed on the proposed lease except the required boundary markers. According to the co-applicants, no build-up of mussels would occur that would interfere with navigation. All dragging and seeding activities would take place between November 1 and April 14 each year when lobster and recreational fishing generally do not occur. Based on this evidence, I find that the proposed lease will not unreasonably interfere with navigation in the area.

According to the application and testimony by the Harbormaster, the area is heavily fished for lobsters during the warmer months. The co-applicants testified that other areas further north in Dyer Bay were currently dragged for mussels. The co-applicants requested a condition on the proposed lease to reduce interference with the lobster fishing. If granted, they would not conduct any seeding or dragging activities on the proposed lease between April 15 and October 31 annually. They also testified for the record in response to a request by the Harbormaster that they would also not drag within the head regions of Dyer Bay, outside of the proposed lease, during the same dates. According to the Department report, the nearest existing 2.0 acre limited-purpose aquaculture lease is located in Gouldsboro approximately 4.3 miles due southwest and the area is located within an area classified as open-approved for the harvest of shellfish. Based on the testimony by the co-applicants to not drag or seed the proposed lease between the dates of April 15 and October 31 each year, that there are no other aquaculture leases in Dyer Bay and that there are other areas available for wild mussel dragging in Dyer Bay, I find that the proposed lease will not unreasonably interfere with fishing, aquaculture leases, or other uses of the area.

The co-applicants requested in writing to reduce the 31.2 acre area requested to 16.2 acres. They provided testimony that this was requested due to the abundance of eel grass on the southern half of the proposed lease. According to the Department's biologist, the proportion of coverage was 60% on the south half compared to an estimated 15% on the north half. Concern was raised that the mussels would negatively impact the nearby clam population on the shore. According to the Department's biologist, this would be unlikely given the pre-existing mussel resource in comparison to the proposed lease activities that would also have to be considered regarding impacts. Based on the evidence, I find that the proposed activities will not unreasonably interfere with the ability of the site and surrounding areas to support existing ecologically significant flora and fauna.

The co-applicants intend to obtain seed mussels from existing wild mussel beds as allowed by statute and regulation or from a supplier such as Great Eastern Mussel. Based on the above, I find that there is an available source of blue mussel seed to be cultured on this site.

According to the charts and evidence the nearest public landing facility is located in Gouldsboro, over three miles distance around Dyer Neck in the next bay. The co-applicants testified that they had permission for access to a private landing facility to unload their harvest in Yeaton Cove approximately one mile south of the proposed lease. Based on this evidence, I find that the proposed lease activities will not unreasonably interfere with public use or enjoyment and that the lease site is not located within 1,000' of any municipally, state or federally owned beaches, parks or docking facilities.

Conclusions of Law

Based on the above findings, I conclude that:

1. The aquaculture activities proposed for this site will not unreasonably interfere with the ingress and egress of any riparian owner;
2. The aquaculture activities proposed for this site will not unreasonably interfere with navigation;
3. The aquaculture lease activities proposed for this site will not unreasonably interfere with fishing or other uses of the area, taking into consideration the number and density of aquaculture leases in the area;

4. The aquaculture lease activities proposed for this site will not unreasonably interfere with the ability of the lease site and surrounding areas to support existing ecologically significant flora and fauna;
5. The applicant has demonstrated that there is an available source of blue mussels, to be cultured for the lease site; and
6. The aquaculture lease activities proposed for this site will not unreasonably interfere with public use or enjoyment within 1,000 feet of municipally, state or federally owned beaches, parks, or docking facilities.

The evidence in the record supports a finding that the proposed aquaculture activities meet the requirements for the granting of an aquaculture lease set forth in 12 M.R.S.A. §6072(7-A).

Decision

Based on the foregoing, the Commissioner grants the requested lease consisting of 16.2 acres to the applicants, for a period of ten (10) years from the date of this decision for the purposes of cultivating blue mussels (*Mytilus edulis*), using bottom culture techniques as described in the application and the hearing record. The applicant shall pay the State of Maine rent in the amount of \$50 per acre per year. The applicant shall post a bond or establish an escrow account in the amount of \$5,000, conditioned upon its performance of the obligations contained in the aquaculture lease documents and all applicable statutes and regulations.

Conditions to be Imposed on Lease

The Commissioner may establish conditions that govern the use of the lease area and impose limitations on aquaculture activities. Conditions are designed to encourage the greatest multiple, compatible uses of the lease area, while preserving the exclusive rights of the lessee to the extent necessary to carry out the purposes of the aquaculture law.

The following conditions are placed on this lease:

1. no seeding and dragging activities shall occur between the dates of April 15th through October 31st, dates inclusive, annually;
2. the lease area shall be marked in accordance with U.S. Coast Guard and Department of Marine Resources requirements;
3. lobster and crab trapping and recreational fishing are allowed on the open areas of the lease.

The Commissioner may commence revocation procedures if he determines that substantial aquaculture has not been conducted within the preceding year or, that the lease activities are substantially injurious to marine organisms. If any of the conditions or requirements imposed in this decision, in the lease, or in the law are not being observed, the Commissioner may revoke the aquaculture lease.

Dated: _____

George D. Lapointe (Commissioner)
Department of Marine Resources